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BEFORE THE ARIZONA CORPORATION COMMISSION

ASSET TRUST MANAGEMENT, CORP.,

DOCKET NO: W-03512A-06-0613

Complainants,

v.

MOTION TO DISMISS

PINE WATER COMPANY, an Arizona  
Corporation,

Respondent.

Pursuant to Rule 12(b)(6), Ariz. R. Civ. P., Respondent Pine Water Company ("PWCo") hereby moves to dismiss complainant Asset Trust Management, Corp.'s ("ATM" or "Complainant") Application for Deletion of Territory from Certificate of Convenience and Necessity ("Application") for failure to state a claim for relief.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL BACKGROUND.**

The area served by PWCo has experienced water supply problems for many years. These problems resulted in various orders from the Commission that imposed limitations on new service connections. See Decision Nos. 56539 (July 12, 1989), 56654 (October 6, 1989), 57047 (August 22, 1990), 59753 (July 18, 1996), 60972 (June 19, 1998), 64400 (January 31, 2002), 67166 (August 10, 2004), 67823 (May 5, 2005). Most recently, in Decision No. 67823, the Commission imposed a temporary limitation of two new

1 residential service connections per month in PWCo's certificated service territory through  
2 April 30, 2006, and now, under that order, no new residential connections are authorized.  
3 Decision No. 67823 at 13. In addition, Decision No. 67823 imposed a "total" moratorium  
4 on main extensions and commercial connections in PWCo. *Id.*

5 On September 25, 2006, ATM filed the Application. The Application  
6 acknowledges that the current moratorium prohibits PWCo from providing service to  
7 ATM's property. Application at 2. ATM then alleges its property should be deleted from  
8 PWCo's CC&N because PWCO is unable to provide service to ATM and that maintaining  
9 ATM's property within PWCo's CC&N is a taking of private property under color of law.  
10 *Id.* at 3, 5. For the reasons discussed below, ATM has failed to state a claim for relief.

## 11 **II. LEGAL ANALYSIS.**

### 12 **A. The Arizona Corporation Commission May Not Delete ATM's** 13 **Property from PWCo's CC&N on the Facts Presented.**

14 The Commission may only delete territory from a CC&N when it can be shown  
15 that the holder of the CC&N is unwilling and unable to provide water utility services to  
16 the territory. *James P. Paul Water Co. v. Arizona Corp. Comm'n*, 137 Ariz. 432, 436, 671  
17 P.2d 410, 414 (App. 1982). By the nature of a CC&N, the government is under an  
18 implied duty to protect the holder of the CC&N from competition because of the public's  
19 interest in regulated monopoly rather than competition in the provision of utility service.  
20 *James P. Paul Water*, 137 Ariz. at 429, 671 P.2d at 407.

21 ATM correctly asserts that public service corporations are under a duty to provide  
22 service in the area covered by the CC&N, however, ATM fails to acknowledge that public  
23 service corporations are likewise bound to comply with all Commission orders. *See, e.g.*,  
24 A.R.S. §§ 40-421 through 40-426. The moratorium established under Decision No. 67823  
25 prohibits PWCo from extending service to ATM's property and PWCo is bound by law to  
26 comply with the Commission's order. The Commission should not delete ATM's

1 property from the current CC&N area based on PWCo's compliance with the  
2 Commission's order as doing so would violate the Commission's implied duty to protect  
3 PWCo's CC&N. *See James P. Paul Water*, 137 Ariz. at 429, 671 P.2d at 407.

4       **B. Public Policy Discourages Deletion of ATM's Property from Pine**  
5       **Water's CC&N.**

6       The Commission may only issue a CC&N after the Commission has made an  
7 adequate showing that the issuance will serve the *public* interest. *James P. Paul Water*,  
8 137 Ariz. at 435, 671 P.2d at 413. After the Commission issues a CC&N, the  
9 Commission carries the burden of regulating this government authorized monopoly in the  
10 public interest. *Id.* at 436, 671 P.2d at 414. ATM's application urges the Commission to  
11 delete the territory for *ATM's* interest, not the *public* interest. If the Commission were to  
12 grant ATM's application, consider the resulting paradox – an area previously determined  
13 ripe for the extreme regulatory action of instituting a moratorium to protect the public  
14 interest, would be removed from the Commission's jurisdiction and oversight.

15       The Commission imposed the moratorium because of water supply problems in the  
16 Pine area. Decision No. 67823 at 3. Deleting ATM's property from PWCo's CC&N does  
17 nothing to improve the water supply problems in the area; in fact, the deletion will further  
18 impede the Commission's ability to regulate water supply in Pine. Random deletion of  
19 territory from the CC&N will result in a disjointed, checkerboard territory, impairing the  
20 Commission's regulation of the area for the public interest.

21       Furthermore, ATM's application should be dismissed because ATM has failed to  
22 pursue alternative remedies that *are* in the public interest. For instance, ATM alleges that  
23 it has the capability of providing domestic water to its property provided it is deleted from  
24 PWCo's CC&N. Application at 3. If so, then ATM could and should apply for a variance  
25 to the moratorium to allow PWCo to serve ATM's property using the alleged water  
26 supply. Such a variance, if granted, allows ATM to obtain water utility service while the

1 Commission maintains jurisdiction over the entire territory for the public interest.  
2 Instead, ATM seeks the extraordinary remedy of deletion. PWCo submits that deletion of  
3 ATM's property from its CC&N is contrary to the public interest.

4 **C. The Moratorium is Not a Taking.**

5 **1. The Commission Does Not Have Jurisdiction to Adjudicate**  
6 **Whether the Moratorium is a Taking**

7 The Commission's jurisdiction is limited to cases in which the Commission has  
8 "primary jurisdiction." *Campbell v. Mountain States Telephone & Telegraph Co.*, 120  
9 Ariz. 426, 429, 586 P.2d 987, 991 (1978). The Commission's primary jurisdiction  
10 generally encompasses "cases raising issues of fact not within the conventional experience  
11 of judges or cases requiring exercise of administrative discretion." *Id.* In *Campbell*, a  
12 telephone customer brought suit against the telephone company alleging various tort  
13 claims in connection with the telephone service. *Id.* at 428, 586 P.2d at 989. The court  
14 held that although the claims dealt with the telephone service, the most important aspects  
15 dealt with theories of tort and contract law which were "the type of traditional claims with  
16 which our trial courts of general jurisdiction are most familiar and capable of dealing." *Id.*  
17 at 432, 586 P.2d at 993.

18 ATM alleges that the Commission's moratorium is a taking of property in violation  
19 of the United States Constitution and the Constitution of the State of Arizona.  
20 Application at 5. Claims dealing with issues of Constitutional law are not within the  
21 primary jurisdiction of the Commission. *Campbell*, 120 Ariz. at 432, 586 P.2d at 993.  
22 The remedy under the takings clause of both the Arizona and United States Constitutions  
23 is for the government to pay "just compensation" for the property "taken". *Lucas v. South*  
24 *Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895 (1992); *Ordway v.*  
25 *Buchanan* 154 Ariz. 159, 162, 741 P.2d 292, 295 (1987). Takings claims are claims with  
26 which "trial courts of general jurisdiction are most familiar and capable of dealing."

1 ATM's claim should be dismissed because the Commission does not have primary  
2 jurisdiction over takings claims.

3                   **2. ATM Does Not Have a Compensable Property Interest in an**  
4                   **Immediate Connection to PWCo's System.**

5           Even assuming the Commission has jurisdiction over the takings claim, the  
6 moratorium on new service is not a compensable regulatory taking of ATM's property  
7 under the Fifth Amendment of the United States Constitution. In Arizona, the threshold  
8 inquiry in a regulatory taking case is that "the particular interest in land with respect to  
9 which a takings claimant asserts a diminution in (or elimination of) value must be a  
10 protected property interest, that is one that inhered in the title acquired by the claimant  
11 when he purchased the property." *Mutschler v. City of Phoenix*, 212 Ariz. 160, 165, 129  
12 P.3d 71, 76 (App. 2006). ATM passes over this threshold inquiry and relies on a footnote  
13 in *Mutschler* for the proposition that the moratorium is a regulation that constitutes a  
14 taking. The reasoning in *Mutschler* (including the quoted footnote) does not support  
15 ATM's position. *Mutschler* involved a Phoenix city ordinance that declared certain  
16 sexually oriented businesses public nuisances. 212 Ariz. at 161, 129 P.3d 71, 72. The  
17 court held that the sexually oriented business in question was a common-law nuisance and  
18 the business did not have a property interest in running the business that was entitled to  
19 protection. *Id.* at 166, 129 P.3d at 77.

20           The United States Supreme Court has held that the extent of the requisite property  
21 rights for purposes of establishing a cognizable taking claim are determined by sources  
22 such as state, federal, or common law. *Lucas v. South Carolina Coastal Council*, 505  
23 U.S. 1003, 1030, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992). Arizona law provides no  
24 property ownership rights in groundwater. *Town of Chino Valley v. City of Prescott*, 131  
25 Ariz. 78, 82, 638 P.2d 1324, 1328 (1982). The moratorium as applied to ATM does not  
26 even meet the threshold inquiry for establishing a takings claim.

1        Given the longstanding limitations on new connections in PWCo's CC&N, ATM  
2 does not have a protected right to an immediate water connection. Since 1989, all the  
3 property within the territory covered by PWCo's CC&N has been subject to various  
4 limitations on the establishment of water utility service. *See, generally*, Decision No.  
5 67823. All property owners, including ATM, that have purchased property in the territory  
6 covered by PWCo's since these limitations have been in place have taken title to the  
7 property subject to the reality of the Commission's various moratoria. *Id.* Therefore,  
8 ATM cannot satisfy the threshold inquiry for a regulatory takings claim.

9                    **3.    The Moratorium Does Not Meet the Requirements of *Penn***  
10                    ***Central* to be a Regulatory Taking**

11        Assuming that ATM were to overcome this threshold inquiry, a determination then  
12 must be made whether the Commission's action of imposing moratoria that prevent  
13 PWCo from extending service amount to a compensable taking of ATM's property  
14 interest under the *Penn Central* test. *See Penn Cent. Transp. Co. v. City of New York*, 438  
15 U.S. 104, 98 S. Ct. 2646 (1978). The *Penn Central* test applies three factors for  
16 determining if a government-imposed regulation amounts to a compensable taking:  
17 (1) the character of the governmental action; (2) the economic impact of the regulation on  
18 the owner; and (3) the extent to which the regulation interferes with the owner's  
19 reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 125.

20        In discussing the first two factors, the U.S. Supreme Court reaffirmed the long  
21 standing principle that "government could hardly go on if to some extent values incident  
22 to property could not be diminished without paying for every such change in the general  
23 law." *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413. (1922)). The  
24 Commission placed the present-day total moratorium on new service connections and  
25 main extensions concluding it was in the public interest. Decision No. 678233 at 13. In  
26 the arid State of Arizona, where water supply concerns are frequent and ongoing, the

1 government could hardly go on if it were required to compensate all citizens any time they  
2 are impacted by limitations established by state agencies. In this case, the Commission's  
3 moratorium only denies ATM connection to PWCo's system until the Commission  
4 determines that it would be in the public interest to allow PWCo to extend service.  
5 While this may have an economic impact on ATM, this is the type of regulation that must  
6 be expected in the arid Arizona climate.

7 Finally, the moratorium does not affect ATM's reasonable investment-backed  
8 expectations. As stated earlier, the territory covered by PWCo's CC&N has been subject  
9 to limitations on new service connections since 1989. *See, generally, Decision No. 67823*  
10 *at 3.* It is not reasonable for ATM to expect immediate connection to PWCo's system  
11 when the Commission's orders have for nearly two decades restricted the extension of  
12 water utility service in one form or another. While ATM does not even meet the threshold  
13 inquiry for a regulatory taking, even if the factors of the *Penn Central* test were applied,  
14 the moratorium is not a regulatory taking of ATM's property.

15 **III. CONCLUSION.**

16 Even if the allegations in ATM's complaint are accepted as true, ATM has no  
17 cognizable claim that would justify deletion of its property from PWCo's CC&N.  
18 Furthermore, the moratorium is not a taking of ATM's property as a matter of law. ATM  
19 does not have a property interest in an immediate connection to PWCo's system, any such  
20 connection is subject to the rules, regulations and orders of the Commission. As a  
21 consequence, PWCo's respectfully requests that the Commission dismiss ATM's  
22 Application because ATM has failed to state a claim for relief.

23 ...

24 ...

25 ...

1 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of October, 2006.

2 FENNEMORE CRAIG, P.C.

3  
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